IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ESTATE OF JERRITH WALTZ,
Deceased, by Collene E. Waltz as
Personal Representative,

Plaintiff-Appellant,

v.

Docket No. 122580

CAROL WYSE, D.O. and
HILLS & DALES COMMUNITY
GENERAL HOSPITAL, individually
and severally,

Defendants-Appellees.
_____/

BRIEF ON APPEAL — APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Colleen Waltz, as personal representative of the Estate of Jerrith Waltz files this Brief within 56 days of this Court order dated April 22, 2003 granting her timely application for leave to appeal pursuant to MCR 7.302(C)(2). (Appendix, page 76a). The application for leave to appeal was filed within 21 days of the unpublished decision of the Michigan Court of Appeals (Waltz v Wyse, ____ Mich App ____, No. 231324, decided October 1, 2002 (Appendix, page 73a)). The Court of Appeals opinion affirmed the Order of Patrick Joslyn, Tuscola County Circuit Court, granting Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (8) disposing of all claims. The Order was entered November 29, 2000. (Appendix, page 71a). The trial court's reasons were stated in an opinion dated November 7, 2000. (Appendix, page 68a). Plaintiff filed a Claim of Appeal within 21 days of the Order.

QUESTIONS PRESENTED FOR REVIEW

I. **WAS PLAINTIFF'S COMPLAINT TIMELY FILED UNDER THE WRONGFUL DEATH STATUTE OF LIMITATIONS, MCL 600.5852, AS EXTENDED BY THE NOTICE REQUIREMENT OF MCL 600.2912b, AND THE PROVISIONS OF MCL 600.5838a(2), AND MCL 600.5856(d), AS WAS RECOGNIZED BY THIS COURT IN OMELENCHUK AND THE COURT OF APPEALS IN CHERNOFF, AND DID THE TRIAL COURT AND THE COURT OF APPEALS ERR IN CONCLUDING OTHERWISE?**

Plaintiff-Appellant answers, "Yes."

The trial court answered, "No."

The Court of Appeals answered, "No."

II. **DID THE TRIAL COURT ERR IN RULING THAT COLLENE WALTZ, THE PERSON WHO FILED THE NOTICE OF INTENT TO FILE SUIT, HAD TO BE APPOINTED PERSONAL REPRESENTATIVE IN ORDER TO FILE THE NOTICE, WHEN THE NOTICE OF INTENT STATUTE HAS NO SUCH REQUIREMENT?**

Plaintiff-Appellant answers, "Yes."

The trial court answered, "No."

The Court of Appeals did not address this question.

III. **DOES THE APPOINTMENT OF COLLENE WALTZ AS PERSONAL REPRESENTATIVE ON MAY 27, 1999, A MONTH PRIOR TO THE COMPLAINT BEING FILED, RELATE BACK TO SERVICE OF THE NOTICES OF INTENT IN JANUARY 1999?**

Plaintiff-Appellant answers, "Yes."

The trial court answered, "No."

The Court of Appeals did not address this question.

IV. **DID THE TRIAL COURT ERR IN GRANTING DEFENDANT WYSE'S MOTION UNDER MCR 2.116(C)(8), BECAUSE THE NOTICES OF INTENT, COMPLAINT, AND AFFIDAVITS OF MERIT ADEQUATELY STATE A CLAIM FOR MEDICAL MALPRACTICE, AND SHOULD THE TRIAL COURT HAVE GIVEN PLAINTIFF THE OPPORTUNITY TO CURE ANY DEFECT PURSUANT TO MCR 2.118(A)(2)?**

Plaintiff-Appellant answers, "Yes."

The trial court answered, "No."

The Court of Appeals did not address this question.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a wrongful-death medical malpractice action brought by Collene Waltz, the mother of Jerrith Waltz, a minor child who died on April 18, 1994. The facts of this case are detailed in the Notices of Intent, the Complaint, and two Affidavits of Merit. (Appendix, pp. 9a-36a) Defendant-Appellee Dr. Carol Wyse was Jerrith Waltz's physician. In February of 1994, Jerrith was seen by Dr. Wyse for projectile vomiting. Dr. Wyse continued to treat Jerrith until his death on April 18, 1994. Between February and April, Dr. Wyse saw Jerrith for complaints of vomiting, diarrhea, pneumonia, inability to eat, and dehydration. During this time period, Jerrith also presented to the emergency room of Defendant Hills & Dales Community General Hospital on March 30, April 13, and April 17, 1994. During these visits in April, Jerrith was suffering from pneumonia, diarrhea and dehydration, none of which were addressed, nor was the child admitted to the hospital. On April 14, Dr. Wyse's office was contacted regarding Jerrith's condition. On April 14 and 15, Jerrith's mother called Defendant Wyse's office, but Defendant Wyse refused to see Jerrith, telling his mother that she should take him to the University of Michigan Hospital in Ann Arbor. Jerrith's mother called U of M Hospital and made an appointment, but the first available appointment was two weeks away.

Jerrith presented to the Emergency Room at Defendant-Appellee Hills & Dales Hospital on April 17, 1994 with the same symptoms. Jerrith was not hydrated by Hills & Dales. He died on April 18, 1994 without ever being hydrated.

Defendants disingenuously maintained in their briefs at the trial court and in the Court of Appeals that the cause of death is unknown. The local pathologist asked Dr. Werner Spitz, long-

time Chief Medical Examiner for Wayne County to consult, and determine the child's cause of death. Dr. Spitz's conclusion is that Jerrith Waltz died of dehydration. This is consistent with the amended certificate of death which was filed a month after Jerrith's death. The cause of death was listed as cardiac dysrhythmia due to acid/base imbalance and dietary intolerance. In other words, an electrolyte imbalance due to dehydration caused his heart to go dysrhythmic, causing his death.

The Notices of Intent to File Claims under MCL 600.2912b detail these facts, and indicate that both Defendants violated the standard of care by failing to address his dehydration and pneumonia, instead abandoning the infant, which resulted in his death. (Appendix, pp. 9a-21a) The Affidavits of Merit by Dr. Kenneth Nelson, Board Certified Family Physician, and by Dr. James Matthews, Board Certified in Emergency Medicine, clearly set out how the Defendants violated the standard of care — they failed to properly evaluate the child, failed to IV hydrate him and give him IV antibiotics, failed to see that he received critical care treatment, and failed to admit him to the hospital. This baby was not properly treated from April 13 to April 18, 1994. As a result, he died of dehydration. (Appendix, pp. 33a-36a).

Collene Waltz, the decedent's mother, engaged the services of attorney Heidi Salter-Ferris to handle the claim. Attorney Salter-Ferris served the Notices of Intent to file claim under MCL 600.2912b on Defendant Hills and Dales Hospital on January 16, 1999, and on Defendant Wyse on January 19, 1999, **which was three months before the statute of limitations expired under MCL 600.5852.** Attorney Salter-Ferris signed the notice in her capacity as "Attorneys for Plaintiff/Claimant. The statute of limitations for a wrongful death action is 3 years after the underlying period of limitations had run. MCL 600.5852. A medical malpractice action must be

brought within two years of the malpractice. MCL 600.5805. Therefore, the statute of limitations did not expire until April 18, 1999, five years after the death of Jerrith. [1] By timely filing the Notice of Intent, the statute of limitations was tolled for 182 days, until October 17, 1999. See Omelenchuk v City of Warren, 461 Mich 567 (2000) [Appendix, pp. 77a-82a] Moreover, under Omelenchuk, the complaint could not be filed until the notice period ran. The notices of intent were received on January 16, 1999 by Defendant Hills and Dales, and on January 19, 1999 by Defendant Wyse. Under the notice statute, MCL 600.2912b, the complaint could not be filed until either 154 days or 182 days ran from those dates. Omelenchuk, supra.[2] Defendants did not respond to the notices, so the earliest the complaint could be filed was on June 22, 1999. Colleen Waltz was appointed personal representative for the Estate on May 27, 1999. Ms. Waltz filed the complaint in Tuscola County Circuit Court on June 23, 1999, one day after the 154 day notice period. This was more than four months prior to the statute of limitations expiring. See Omelenchuk v City of Warren, supra. This was 155 days after the notices of intent were served.

Not only did Defendants-Appellees fail to respond in writing to the notices -- they also did not object to the factual or legal adequacy of the notices of intent during the time Ms. Waltz waited the statutorily mandated 154 days to file her complaint. Defendant-Appellees also did not object and argue during this 154 day waiting period that the notices of intent were not valid because Plaintiff had not been appointed personal representative at the time the notices were

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[1]The Defendants conceded in their motion in the trial court that because this is a wrongful death action, MCL 600.5852 is applicable, and the statute of limitations did not run until April 18, 1999, five years from the death of Jerrith Waltz.

[2]If the Defendants did not respond to the notices, Plaintiff could file the complaint after waiting 154 days. If Defendants responded, then Plaintiff would have to wait 182 days to file the complaint. MCL 600.2912b(7) and (8).

served. Defendant Wyse instead waited until October 21, 1999 -- four days after the statute of limitations had expired -- to file a Motion for Summary Disposition, arguing that the notices of intent to file claim under MCL 600.2912b were not valid, because at the time of their service, no personal representative had been appointed. Defendant Wyse also challenged the factual and legal sufficiency of the notices of intent, complaint, and affidavits of merit. Defendant Hills & Dales joined the Motion on February 25, 2000, but only as to the statute of limitations arguments. Hills & Dales did not argue that the notices of intent, complaint, and affidavits of merit were factually insufficient under MCR. 2.116(C)(8).

Defendants-Appellees argued in both the trial court and the Court of Appeals that Plaintiff's claim was barred by the statute of limitations because: 1) the MCL 600.2912b notice period which tolls the statute of limitations for 182 days according to this Court's holding in Omelenchuk does not extend the limitations period in wrongful death actions, MCL 600.5852, but only applies to the original medical malpractice two year statute of limitation, MCL 600.5805; and 2) even if the Sec. 2912b notice does extend the wrongful death limitations period, MCL 600.5852, the Notices of Intent here were not valid here because no personal representative had been appointed when the notices were issued. Defendant Wyse also argued under MCR 2.116(C)(8) that the notices of intent, complaint, and affidavits of merit were defective because they failed to specifically state the standard of care which was breached. Defendant Hills & Dales did not join in the (C)(8) argument.

Plaintiff filed an answer to the motions on May 11, 2000. She argued that the trial court should reject the Defendants statute of limitations argument for three reasons. First, under Omelenchuk, this Court had already ruled in *Omelenchuk v City of Warren,* 461 Mich 567

(2000) that the 182 day tolling provisions of MCL 600.5856(d) **did apply** to the extended limitations period allowed under the wrongful death statute. MCL 600.5852. This Court specifically held on p. 577 of *Omelenchuk* that the 182 day tolling provision ran from the date that the personal representative was appointed (i.e., from the date the statute was extended by MCL 600.5852), not from date the two year medical malpractice statute of limitations accrued. (*Omelenchuk* is part of the Appendix, pp. 77a-82a). **In other words, this Court held in *Omelenchuk* that the wrongful death savings statute of limitations under MCL 600.5852 was tolled for by the Notice of Intent.**

Second, the notice of intent statute, MCL 600.2912b, by its clear language does not require that the "person" giving notice have any particular status, let alone that of personal representative. Collene Waltz was the person giving notice. As is required by the wrongful death statute, she was later appointed personal representative **so that she could file the complaint**. Collene Waltz was the person who commenced the action. Neither the NOI (Notice of Intent) statute, MCL 600.2912b, nor the wrongful death statute, MCL 600.2922, require that a personal representative be in place in order to file a valid NOI. Moreover, the Defendant's argument is contrary to the legislative purpose behind the NOI requirement — to encourage settlement of medical malpractice actions without the need for formal litigation. Requiring a person who gives notice to first commence probate proceedings and obtain appointment as personal representative would be contrary to the legislatively intended mechanism for commencing an informal process.

Third, even if the NOI is interpreted to require that a personal representative be appointed before the notice can be filed, under Osner v Boughner, 152 Mich App 744(1986); and Saltmarsh v Burnard, 151 Mich App 475, the appointment of Collene Waltz as personal representative in

May, 1999 prior to the complaint being filed, relates back to the service of the notices of intent in January, 1999.

As to Defendant Wyse's argument that the Notices of Intent, Complaint, and Affidavits of Merit failed to state a claim under MCR 2.116(C)(8)[3], Plaintiff argued that her claim for malpractice was clearly set out in those documents, and is relatively simple — during April of 1994, Jerrith Waltz presented to the Defendants with pneumonia, diarrhea, and dehydration, and the Defendants did not adequately treat him. The Affidavits of Merit clearly set out what the Defendant Wyse should have done. Defendant Wyse should not have abandoned the infant. Jerrith Waltz should have been hospitalized, and given IV antibiotics and hydration. If he had been, he would not have died of dehydration. The Defendants had five days to hydrate Jerrith. They did not do so, instead abandoning him, and as a result of their negligence, he died of dehydration. Plaintiff argued that she did state an adequate claim against Defendant Wyse in the Notices of Intent, the Complaint, and the Affidavits of Merit upon which relief could be granted, including the standard of care.

Oral argument was presented to Tuscola County Circuit Judge Patrick Joslyn on June 2, 2000. At argument, Defendants focused on their statute of limitations claims. As to Defendant Wyse's MCR 2.116(C)(8) failure to state a claim argument, Defendant Wyse's counsel suggested that the remedy the trial court should fashion was to order Plaintiff to file an amended complaint, or make a more specific statement of the allegations of negligence and proximate cause. (Appendix, p. 43a). Defendant Wyse's counsel did not argue that Plaintiff's complaint should be

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[3]Again, Defendant Hills & Dales did not make this argument below. It based its motion for summary disposition solely on the statute of limitations arguments.

dismissed with prejudice under MCR 2.116(C)(8).

On November 7, 2000, the trial court issued a 3 page written opinion. (Appendix, pp. 73a-75a) The court dismissed the case for the following reasons:

1. It held that the 182 day tolling provision of the notice statute, MCL 600.2912b recognized by this Court in Omelenchuk, only applied to the original two year medical malpractice statute of limitations (MCL 600.5805), not to the extended wrongful death period of limitations under MCL 600.5852. Unfortunately, the trial court misinterpreted *Omelenchuk,* and ruled that the 182 day tolling provision did not toll the wrongful death limitations statute— that a complaint in a wrongful death case must be filed by the personal representative within two years of her appointment, or within three years of the statute of limitations regardless of whether an NOI was filed. The effect of this ruling is to reduce the wrongful death limitations statute (MCL 600.5852) by six months. This is because a notice of intent must still be filed in a wrongful death medical malpractice case, but the estate must wait six months from that date to file the suit. If the notice is filed like in this case 4 years nine months from the date of the malpractice, the personal representative cannot file the suit until six months later. If the wrongful death statute is not tolled by the notice, then the statute expires at five years from the date of the malpractice. Similarly, under MCL 600.5852, when a personal representative is appointed, (s)he has two years from the date of appointment in which to file suit. Under the trial court's ruling, a personal representative would have to file the Notice of Intent within 18 months of appointment. If (s)he waited until 19 months after her appointment to file the notice, she would have to wait an additional 182 days for the notice to expire, which would be 25 months after appointment. This would be one month after the wrongful death statute of limitations had expired. Thus, under the trial court's ruling, if

an NOI is filed during the last six months of either extended period allowed by MCL 600.5852, the estate is out of luck, because the estate cannot file a complaint during that last six months because the notice period has not run. The notice statute prevents the estate from filing the complaint "early" before the notice period has run.

2. Even if the 2912b notice could extend the five year wrongful death limitations period, Collene Waltz had no authority to file the notice of intent because she was not appointed personal representative when the notices were filed.

3. Despite Defendant Wyse's suggestion during oral argument that the trial court should require Plaintiff to file a more specific amended complaint, the trial court instead ruled that Plaintiff failed to state a claim upon which relief could be granted against Defendant Wyse because Plaintiff failed to specifically plead what acts or omissions Defendant Wyse did or did not do.

Plaintiff appealed as of right to the Court of Appeals, raising all of the arguments made in this brief. Plaintiff emphasized this Court's decision in *Omelenchuk.* Prior to oral argument, the Court of Appeals issued an unpublished decision which followed *Omelenchuk. Audrey Chernoff v Sinai Hospital of Detroit and the Detroit Medical Center,* ____ Mich App ____ Case No. 228014, decided March 22, 2002, leave to appeal held in abeyance by this Court by order dated April 23, 2002, 661 N.W. 2d 237 [4] (Appendix, pp. 83a-86a). Consistent with *Omelenchuk,* the Court of Appeals in *Chernoff* disagreed with Defendants' contention, and the trial court's ruling.

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[4] Plaintiff filed a motion in the Court of Appeals asking the Court to allow her to cite and argue *Chernoff.* The Court granted Plaintiff's motion. The Court also specifically discussed *Chernoff* in their opinion in this case. This Court has held in abeyance the *Chernoff* defendants' application for leave to appeal pending the decision in this case.

The Court held that the tolling provisions of MCL 600.5856(d) do apply to the "extended" wrongful death statute of limitations. See footnote 1, *Chernoff*. The decedent in *Chernoff* died on September 29, 1995. The two year statute of limitations for medical malpractice actions would therefore expire on September 29, 1997. However, the plaintiff was appointed personal representative of the decedent's estate on April 23, 1997, thereby extending the statute of limitations for two years from the date the personal representative was appointed, until April 23, 1999. Defendants argument here, applied to the facts in *Chernoff*, would be that the 182 day tolling provision does not apply to this extended two year period for the personal representative to file suit. The Court of Appeals disagreed, holding: "The filing would have been within the statutory period, which defendants contend expired on September 24, 1999, provided plaintiff had remained the personal representative." [The letters of authority expired on June 18, 1998, and plaintiff was not reappointed personal representative until ten months after suit was filed.] In footnote 1, the Court further explained, **"Ordinarily, the statute of limitations would have expired on April 23, 1999, or two years after plaintiff was first appointed personal representative. Because plaintiff filed a notice of intent on April 16, 1999, the limitation period was tolled under MCL 600.5856(d) until September 24, 1999.** [Emphasis added].

Inexplicably, the Court of Appeals in this case ignored both *Omelenchuk,* and *Chernoff,* and agreed with the trial court that the 182 day tolling provision during the required waiting period for the NOI to expire, does not apply to the wrongful death limitations statute. MCL 600.5852. Waltz v Wyse, ____ Mich App ____ (No. 23124, decided October 1, 2002). (Appendix, pp. 73a-75a). The Court of Appeals' fall back position found in footnote 2 of their opinion is that somehow the tolling provision of MCL 600.5856(d) might apply to the two year

period given to a personal representative to file suit under MCL 600.5852, but does not apply to the five year total period allowed under the same statute:

> "To the extent that plaintiff relies on *Omelenchuk, supra* at 577, we find that case distinguishable. In that case, the Supreme Court added the 182-day tolling period to the two-year limitation period that started when the personal representative was appointed, not the five-year maximum at issue here. Plaintiff also cites *Chernoff v Sinai Hospital of Greater Detroit,* unpublished per curiam opinion of the Court of Appeals, entered March 22, 2002. (Docket No. 228014), in which this Court applied notice tolling to the two-year period after appointment of a personal representative. However, we are not bound by an unpublished opinion, MCR 7.215(C)(1), and further, that decision also did not address the five-year maximum."

Thus, the Court of Appeals below concedes that this Court has ruled directly contrary to their holding. They attempt to distinguish *Omelenchuk* and *Chernoff* by saying that even if the 182 day tolling period applies to the two year period given to a personal representative to file suit under MCL 600.5852, the same tolling provision somehow does not apply to the five year total period allowed under the same statute. Such a distinction makes absolutely no sense—either the tolling provision applies to all of the provisions of MCL 600.5852, or it does not.

Plaintiff timely filed an application for leave to appeal to this Court arguing that this Court should grant the application and reverse the Court of Appeals because the Court of Appeals decision is directly contrary to this Court's decision in *Omelenchuk,* and the Court of Appeals decision in *Chernoff.* MCR 7.302(B)(5). **Plaintiff also argued that if the decision below is allowed to stand, the effect will be to shorten the wrongful death limitations period (MCL 600.5852) in which to file a medical malpractice action by 182 days.** This Court granted the application by Order dated April 22, 2003. (Appendix, p. 76a)

Because the Court of Appeals ruled that wrongful death limitations was not tolled for 182 days under MCL 600.5856(d), it did not reach the other issues raised by Plaintiff on appeal.

Plaintiff raises those issues here in anticipation that this Court will follow *Omelenchuk.*

ARGUMENT

I. PLAINTIFF'S COMPLAINT WAS TIMELY FILED UNDER THE WRONGFUL DEATH STATUTE OF LIMITATIONS, MCL 600.5852, AS EXTENDED BY THE NOTICE REQUIREMENT OF MCL 600.2912b, AND THE PROVISIONS OF MCL 600.5838a(2), AND MCL 600.5856(d), AS WAS RECOGNIZED BY THIS COURT IN OMELENCHUK AND THE COURT OF APPEALS IN CHERNOFF. THE TRIAL COURT AND COURT OF APPEALS ERRED IN CONCLUDING OTHERWISE.

Standard of Review

Questions of statutory interpretations are decided de novo, as are legal questions involving the statute of limitations. Omelenchuk v City of Warren, supra at 571, n. 10. (Appendix, pp.)

The Statute of Limitations Facts In This Case

In column format, the following events are relevant to the statute of limitations analysis involved here:

Date	Description
4/18/94	Jerrith Waltz (age 4 months) dies
4/18/96	Expiration of MCL 600.5805 two year limitations period
1/09/99	Notice of Intent sent to Defendant Carol Wyse
1/14/99	Notice of Intent sent to Defendant Hills & Dales Hospital
1/16/99	Hills & Dales received Notice of Intent
4/18/99	Expiration of MCL 600.5852 wrongful death three year extension of statute of limitations.
5/27/99	Personal representative appointed
6/22/99	154 day notice waiting period expires

6/23/99	Suit filed by personal representative.
10/17/99	Expiration of MCL 600.5852 wrongful death statute if tolled by the 182 day notice requirement

The Medical Malpractice Statute of Limitations Statutory Provisions

"In actions brought under the wrongful death statute . . . , the limitations period is governed by the provision applicable to the liability theory of the underlying claim. Turner v Mercy Hospitals & Health Services of Detroit, 210 Mich App 345, 349 (1995). MCL 600.5805(5) provides: "**except as otherwise provided in this Chapter [Chapter 58 of the Revised Judicature Act]** the period of limitations is two years for an action alleging malpractice." Chapter 58 of the RJA includes the provisions MCL 600.5801 through MCL 600.5869, including the statute of limitations applicable to wrongful death actions, MCL 600.5852, and including the 182 day tolling provisions applicable to the notice requirements in medical malpractice actions. MCL 600.2912b; and MCL 600.5856(d). It also includes MCL 600.5838a(2) which provides:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 **or section 5851 to 5856,** or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. . . [Emphasis added.]

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, MCL 600.5852 extends the statute of limitations for three years, making the period of limitations effectively five years:

> "[Such action] [m]ay be commenced by the personal representative of the deceased person **at any time within two years after letters of authority are issued** although the period of limitations has run. **But** an action **shall not be brought** under this provision **unless the personal representative commences it**

within three years after the period of limitations has run." [Emphasis added].

This wrongful death limitations statute allows a wrongful death action to be brought five years from the date of the death in wrongful death actions, i.e., "it must be commenced within 3 years after the period of limitations has run." See Hawkins v Regional Medical Laboratories, P.C., 415 Mich 420 (1982) [savings statute gives estate until three years after the statute of limitations had run in which to bring a cause of action]. The Defendants concede this. They conceded in their briefs in the trial court and the Court of Appeals that under MCL 600.5852, the statute of limitations here expired on April 18, 1999. The purpose of the extended statute is to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue the action. It accomplishes this goal by "operating to toll the statute of limitations . . . in actions brought under [the wrongful death act]. Hardy v Maxheimer, 429 Mich 422, 441 (1987). That is, it suspends the "running of the statute [i.e., Sec. 5805] until a personal representative is appointed to represent the interest of the estate." Lindsey v Harper Hospital, 455 Mich 56, 61 (1997)

Another tolling provision in the RJA is found in MCL 600.5856(d). It specifically provides that statutes of limitations or repose are tolled by the 182 notice period for obligations imposed by MCL 600.2912b. Section 2912b obligates the "person" issuing the Notice of Intent to "give" it to the health care provider "not less than 182 days before the action is commenced." MCL 600.2912b(1). Under MCL 600.5856, the statutes of limitations or repose are tolled during this 182 waiting period :

"The statutes of limitations or repose are tolled:

(a) At the time the complaint is filed and a copy of the summons and

complaint are served on the defendant;

(b) At the time jurisdiction over the defendant is otherwise acquired;

(c) At the time the complain is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service . . .'

(d) If, during the applicable notice period under Sec. 2912b, **a claim would be barred by the statute of limitations** or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with Sec. 2912b." [Emphasis supplied]

Here, Plaintiff's claims were not time-barred when the Notices of Intent were served in January, because, at the time, the five year statute under MCL 600.5852 had not expired. It expired on April 18, 1999. The notices were served on January 16, and January 18, 1999. As a consequence, Plaintiff was entitled to have the extended limitations period tolled during the Sec. 2912b notice period because of MCL 600.5856(d).

The Defendants have argued that the "savings" statute of limitations in wrongful death actions, MCL 600.5852, is not extended by the 182 day notice requirement for medical malpractice actions in MCL 600.2912(b), and the tolling provisions of MCL 600.5856(d). Defendants argue that the 182 day notice of intent to file claim requirement does not toll this five year statute. **They essentially argue that the notice has to be filed prior to four and one half years after decedent's death, because the plaintiff has to wait another half year before she could file suit.** The Notices of Intent to File Claim were served in this case on January 16 and 19, 1999, three months before the statute of limitations expired on April 18, 1999. However, because plaintiff had to wait another 182 days before filing suit (or 154 days if the claim was

rejected) suit was not filed until June 23, 1999. The Defendants argue that the complaint had to be filed prior to April 18, 1999, regardless of when the notice was filed. The trial court agreed with this analysis, as did the Court of Appeals.

Rules for the Construction and Interpretation of Statutes

The "foremost rule . . . in construing a statute is to ascertain and give effect to the intent of the Legislature." Sun Valley Foods Co. v Ward, 460 Mich 230, 236 (1999). The "first criterion in determining intent is the specific language of the statute," Stevens v Inland Waters, Inc., 220 Mich App 212, 215-216 (1996), since courts "may not speculate about probable intent of the Legislature beyond the words expressed in the statute." Id. at 215-216. Where the Legislature has used clear and unambiguous language to express its intent, the "plain meaning of the statute must be followed." Hoover Corners v Conklin, 230 Mich App 567, 572 (1998). On the other hand, if the statute is ambiguous — that is, "[i]f reasonable minds [could] differ regarding it meaning, judicial construction is appropriate." Baks v Moroun, 227 Mich App 472, 481 (1998). In either event, the Court "must look to the object of the statute, the harm it was designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute." Id., at 481. **Moreover, the construction and interpretation of the statute must "be aimed at preventing injustice and hardship." 21 MLP, Statutes Sec. 83 at 86. This is especially true when it comes to interpreting the effect of the tolling provision of MCL 600.2912b on the timely filing of wrongful death/medical malpractice actions. This Court stated in *Omelenchuk, supra* at 576, fn 19:**

"The Legislature surely did not intend its tolling provision as a trap for the unwary, and we will not interpret the ambiguous words 'after the date notice is given' in that manner without a clear textual indication that the Legislature so intended."

To aid statutory construction and interpretation, the appellate courts have developed a number of rules [i.e., analytical tools] to assist in the process. Those rules include, among others, the following: (i) the language of the statute should be construed reasonably, keeping in mind its purpose, Baks v Moroun, 227 Mich App at 481; (ii) the Court should "presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, surplusage or nugatory", In re Brzezinski, 214 Mich App 663 (1997); (iii) "[c]ourts may not speculate about the probable intent of the Legislature beyond the words expressed in the statute", Stevens v Inland Waters, Inc., 220 Mich App at 215-216; (iv) the Legislature is presumed to have intended the meaning it plainly expressed, In re Brzezinski, 214 Mich App at 662; and (v) it is presumed that the "Legislature had knowledge of existing laws regarding the subject when it enacted or amended a law." In re Parole of Glover, 226 Mich App 665, 675 (1997).

A. Utilizing These Rules of Statutory Construction, MCL 600.2912b Extends the Wrongful Death Statute of Limitations Period

According to MCL 600.5856:

"The statutes of limitations or repose are tolled:

(d) If, during the applicable notice period under Sec. 2912b, **a claim would be barred by the statute of limitations** or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with Sec. 2912b." [Emphasis supplied]

Under the plain language of this provision, the Sec. 2912b notice provision tolls **any medical malpractice claim that would be barred by the statute of limitations or repose. This obviously includes wrongful death actions.** When does the statute of limitations run in a **wrongful death medical malpractice claim**? It runs at three possible times: (i) two years from the date of the medical act or omission [Sec. 5838a(1)], (ii) two years after the personal

representative is appointed, provided suit is filed no later than three years after the expiration of the original Sec. 5805 limitations period [Sec. 5852], or (iii) within three years plus six months after the plaintiff discovers or should have discovered the existence of a claim — whichever is later. Miller v Mercy Memorial Hospital, 466 Mich 196 (2002). On it face, this provision tolls "the statutes of limitation" — it neither makes reference to nor implies that it only tolls the Sec. 5805 limitations period. Instead, it tolls "the statute of limitations."Thus, in this case, the notice provision tolled statute of limitations applicable to wrongful death claims — five years -- for 182 days. Plaintiff served the notices in January, 1999. The five year statute of limitations was set to run on April 18, 1999, but was extended by the notices for 182 days, until October 17, 1999. Plaintiff filed her complaint after waiting the required 154 days, filing it on June 23, 1999, exactly 155 days after serving the second notice.

The courts below held that the MCL 600.2912b notice period (i.e., 182 days) could not be used to toll the wrongful death extended limitations period, MCL 600.5852, whether that period is two years from the date of the appointment of the personal representative, or three years from the date the underlying statute of limitations expired. The courts below cited no case which has adopted this analysis; the courts did not explain why a Sec. 2912b notice and MCL 600.5856(d) should not toll 600.5852 since, by its very language, 5852 extends the two year medical malpractice limitations period under MCL 600.5805; and, **most importantly, it completely ignored the analysis implicit in Omelenchuk v City of Warren, supra, and explicit in Chernoff v Sinai Hospital, supra. In Omelenchuk, this Court specifically applied the 2912b notice period to toll the 5852 extended limitations period. Id. At 569, 577. The Court of Appeals did the same thing in Chernoff.** Thus, neither the statutes nor the cases which have

interpreted them support the ruling of the courts below.[5]

The Court of Appeals reasoning below was that MCL 600.5852 is a "savings" statute, not a statute of limitation, citing this Court's recent decision in *Miller v Mercy Memorial Hospital*, 466 Mich 196, 201 (2002). The Court concluded that under the precise terms of MCL 600.5856, the 182 day notice provision under section 2912b, only applies to statutes of limitations and repose, i.e., MCL 600.5805, and not to tolling or savings statutes, like the wrongful death limitations statute. MCL 600.5852. There are six major problems with this reasoning:

1. The Court of Appeals ignored the language of the first sentence of MCL 600.5856, and instead only focused on the words"statute of limitations or repose." The sentence reads that the running of a statute is tolled, "If, during the applicable period under section 2912b, **a claim** would be barred by the statute of limitations or repose." In focusing on the words "statute of limitations or repose" the Court of Appeals lost sight of what this sentence is saying about **claims**. It says that the running of a statute is tolled "**if a claim becomes barred during the running or the applicable notice period by a statute of limitations or repose.** The statute is focused on claims becoming barred during the 182 day notice period--it is not focused on the statute of limitations or repose. **Wrongful death medical malpractice claims become barred during the running of the notice period because of the statute of limitations, just like any other medical malpractice actions. The statute of limitations applicable to medical malpractice wrongful death claims do continue to run during the notice period, just like they do as to all medical**

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[5] Every appellate case that has ever been faced with the issue of whether the 182 notice provision tolls the wrongful death/medical malpractice statute, MCL 600.5852, has held that it does. *See* Fournier v Mercy Community Health Care System-Port Huron, 254 Mich App 461 (2003); and Knobloch v Langholz, ____ Mich App ____ (No. 231070, decided June 21, 2002), 2002 WL 1360388.

malpractice claims.

2. *Miller* had absolutely nothing to do with the issues raised in this case. In fact, this Court in *Miller* was faced with the issue of whether the six month discovery rule for medical malpractice actions under MCL 600.5838a(2) was incorporated in the wrongful death limitations statute. MCL 600.5852. The Court of Appeals in *Miller* had ruled that under MCL 600.5852, a personal representative who wants to bring a medical malpractice case must do so within two years of his appointment, and could not avail herself of the six month discovery rule allowed by MCL 600.5838a(2). This Court disagreed, ruling that the personal representative could avail herself of the six month discovery rule, and could bring a claim within three years of the date of discovery of the malpractice. MCL 600.5852. As part of the ruling, this Court recognized that the purpose of MCL 600.5852 was "to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions." *Miller*, citing *Lindsey v Harper Hospital*, 455 Mich 56, 66 (1997). This same statutory purpose should have convinced the Court of Appeals that the purpose of the tolling provisions at issue here is not to prevent claims by estates, but to allow them more time to make such claims and settle them.

3. The Court of Appeals here ignored the decision of this Court in *Omelenchuk*, and the Court of Appeals earlier decision in *Chernoff, supra.* In both cases, the Courts clearly applied the MCL 600.5856(d) tolling provision to MCL 600.5852, i.e., to the extended periods in which to file suit under the wrongful death act. MCL 600.5852. The Court of Appeals here recognized this incongruity, but attempted to distinguish these case in a footnote! The supposed distinction is that those cases allowed a tolling of the two year limitation period that started when the personal representative was appointed, not to the five year maximum at issue here. This is a distinction

without a difference. The tolling provision of MCL 600.5856 either applies to all of the provisions of MCL 600.5852, or it doesn't. The Court of Appeals did not explain how the tolling provision can apply to half of MCL 600.5852 under *Omelenchuk*, and *Chernoff*, but not to the other half in this case. This supposed distinction makes no sense factually or legally.

4. The gist of the Court of Appeals decision is that the tolling provisions of MCL 600.5856 only apply to the statute of limitations contained in MCL 600.5805 and 600.5838(2), but not to the extended "savings" periods in which to file a wrongful death suit. By doing so, the Court of Appeals is ignoring the clear language of both MCL 600.5805 and 600.5838(2). MCL 600.5805 provides: "**except as otherwise provided in this Chapter (Chapter 58 of the Revised Judicature Act)** the period of limitations is two years for an action alleging malpractice." Chapter 58 of the RJA includes the provisions MCL 600.5801 through MCL 600.5869, including the statute of limitations applicable to wrongful death actions, MCL 600.5852, and including the 182 day tolling provisions applicable to the notice requirements in medical malpractice actions. MCL 600.2912b; and MCL 600.5856(d). In other words, the period of limitations for a wrongful death medical malpractice action is much longer than two years. MCL 600.5852 may be a termed a "saving" statute — however, its effect is to extend the statute of limitations for wrongful death actions an extra three years after the underlying statute of limitations has run. **The language of MCL 600.5838a(2) also recognizes that the period for bringing a wrongful death action is extended by *both* MCL 600.5852 and 600.5856:**

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 **or section 5851 to 5856,** or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. . . [Emphasis added.]

The Court of Appeals ignored this very clear language of 600.5838(2) in this case. Plaintiff made this same argument to the Court of Appeals, but the court did not even discuss this statutory language. The clear language of MCL 600.5838a(2) provides that a medical malpractice action may be brought within the extended period to bring a wrongful death action, *and* within the *additional* extended period of six months required by the tolling provisions of MCL 600.5856(d). The statute says, "may be commenced at any time within the applicable period prescribed in sections 5851 to 5856. The language is stated in the conjunctive, not the disjunctive.

5. Taken to its illogical conclusion, the Court of Appeals decision means that **none** of the tolling provisions found in MCL 600.5856 apply to an action brought under the Wrongful Death Act. The Court of Appeals here held that the statute in question expressly tolls only statutes of limitations or repose, and because MCL 600.5852 is technically not a statute of limitations, but only extends the statute of limitations, it is not tolled. The problem with this holding is that MCL 600.5856 by its very language states that:

> "The statute of limitations or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant;
>
> (b) At the time jurisdiction over the defendant is otherwise acquired;
>
> (c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service . . .'
>
> (d) If, during the applicable notice period under MCL 600.2912b, a claim would be barred under the statute of limitations or repose . . .

The statute states that only statute of limitations or repose are tolled by these acts. Thus, under the Court of Appeals ruling here, an action under the Wrongful Death Act cannot be tolled by filing the action on the last day of the statute of limitations, and then placing the complaint and summons in the hands of a process server to be served within 90 days. Under the reasoning of the Court of Appeals, a Wrongful Death Act complaint must be filed and served within the statute of limitations. This is not the law. No court in the history of Michigan jurisprudence has singled out a Wrongful Death action to be treated more strictly than other actions. A wrongful death action may be filed on the last day of the statute of limitations, and may be served within 90 days after the statute has run. Under the Court of Appeals decision here, a wrongful death action could not even be served after the statute of limitations has run, even if it was timely filed. This is contrary to the decisions of our appellate courts repeatedly recognizing that the purpose of MCL 600.5852 is to give an estate more time to bring actions, not less. *See* Eggleston v Bio-Medical Applications of Detroit, _____ Mich ____ (No. 121208, decided March 26, 2003), 2003 WL 1558038.

6. The effect of this ruling is to reduce both parts of the wrongful death limitations statute (MCL 600.5852) by six months. This is because a notice of intent must still be filed in a wrongful death medical malpractice case, but the claimant must wait six months from that date to file the suit. If the notice is filed like in this case 4 years nine months from the date of the malpractice, the law prevents the suit from being filed until six months later. If the wrongful death statute is not tolled by the notice, then the statute expires at five years from the date of the malpractice. Similarly, under MCL 600.5852, when a personal representative is appointed, (s)he has two years from the date of appointment in which to file suit. Under the trial court's ruling, a

personal representative would have to file the Notice of Intent within 18 months of appointment. If (s)he waited until 19 months after her appointment to file the notice, she would have to wait an additional 182 days for the notice to expire, which would be 25 months after appointment. This would be one month after the wrongful death statute of limitations had expired. Thus, under the trial court's and Court of Appeals' rulings, if an NOI is filed during the last six months of either extended period allowed by MCL 600.5852, the estate is out of luck, because the estate cannot file a complaint during that last six months because the notice period has not run. The notice statute prevents the estate from filing the complaint "early" before the notice period has run.

This could not have been the intent of the legislature in passing the 182 day notice requirement. The purpose of the waiting period was not to trap unwary claimants — it was instead to provide time for the parties to resolve claims during the notice period. Omelenchuk, supra, at 576, fn 19. There is nothing in the statutory language or history that would lead this Court to conclude that the Legislature even thought about whether this notice provision and period was shortening the time that an estate could timely file suit. In fact, this Court has repeatedly recognized that the purpose of MCL 600.5852 is to preserve actions that survive death so that there is a reasonable time to pursue wrongful death actions. Miller, supra at 202-203. The period of time is two years from the appointment of the personal representative, not 18 months; and it is five years from the date of the malpractice, not four and one half. The legislature did not intend to shorten the ability to bring a lawsuit by six months, by requiring the NOI to be filed at least six months before the wrongful death statute expired. If they had intended to do so, they would have used specific language amending MCL 600.5852.

B. **This Case is Controlled by This Court's Decision in Omelenchuk. Omelenchuk Illustrates the Proper Application of These Statutory Provisions. This Court in Omelenchuk Applied the 182 Day Notice Waiting Period to the "Extended" Wrongful Death Limitations Period. The Court of Appeals Did the Same in Chernoff, Fournier, and Knobloch.**

Inexplicably, the Court of Appeals in this case ignored both *Omelenchuk,* and *Chernoff,* and agreed with the trial court that the 182 day tolling provision does not apply to the wrongful death limitations statute. MCL 600.5852.

The Defendants argued below, and the trial court and the Court of Appeals held that Omelenchuk v City of Warren, supra, is not applicable to this case. They are simply wrong. A close reading of the case shows that this Court applied the 182 day tolling period to the extended wrongful death limitations period, not the two year medical malpractice limitations period. (Appendix, pp. 77a-82a)

In Omelenchuk, the plaintiff's decedent died from negligent medical care following a heart attack at work on February 13, 1994. Plaintiff claimed that an emergency medical technician caused his death by failing to correctly insert an endotracheal tube. The technician apparently missed his trachea, and inserted the tube into the esophagus. The decedent's personal representative was appointed one day later -- on February 14, 1994. Under MCL 600.5852, the wrongful death statute of limitations expired on February 14, 1996, two years from the date the personal representative was appointed. [6] The personal representative filed the required notice of intent to file claim on December 11, 1995, two months before the wrongful death statute of

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[6]The statute provides that if a personal representative is appointed, the action must be brought within 2 years of appointment. However, no action may be brought later than 3 years after the underlying period of limitations has run. Therefore, the in a medical malpractice action, the statute of limitations can be as long as five years. MCL 600.5852

limitations expired. She then waited the requisite 182 days required by MCL 600.2912b. The personal representative did not file suit until July 19, 1996, well after the statute limitations had run. The defendant brought a motion for summary disposition based on the statute of limitations. The trial court and Court of Appeals dismissed the case. This Court reversed, finding that 1) the plaintiff could not bring action without filing the notice of intent to sue; 2) the plaintiff had to wait 182 days from date of filing notice before she could sue; and 3) **when, as here, the statute of limitations expires during the notice period, the wrongful death statute of limitations period under MCL 600.5852 is tolled for 182 days from the date the notice is filed under MCL 600.5856(d).**

Although the principal focus of the case concerned the length of the tolling period permitted under Sec. 5856(d) and Sec. 2912b, the Court in computing the limitations period implicitly held that the Sec. 2912b notice period tolls the limitations period extended under Sec. 5852. **The Court computed the limitations period under the wrongful death extension (from February 14, the date the personal representative was appointed), not under the medical malpractice limitations period (February 13, the date the malpractice occurred):**

> "In the present case, the plaintiff's decedent died on February 13, 1994. The plaintiffs received their letters of authority the next day, February 14, 1994. **Thus, the two-year limitations period [i.e. Sec. 5852] was set to expire on February 14, 1996.**
>
> On December 11, 1995 (65 days before the expiration of the limitation period) the plaintiffs provided the required notice to the defendants. As a result of the notice, **the limitation period [i.e. Sec. 5852] was tolled for 182 days.** Rather than expiring on February 14 [i.e., the date mandated by Sec. 5852], the limitations period [i.e., Sec. 5852] thus was tolled from December 11, 1995, until June 10, 1996; it then resumed for another 65 days until it expired on August 14, 1996.
>
> The plaintiffs . . . filed their complaint on July 19, 1996, nearly a month before the

end of the recalculated limitation period." 461 Mich at 577. [Emphasis supplied].

Prior to oral argument before the Court of Appeals in this case, the Court of Appeals issued an unpublished decision which followed *Omelenchuk. Audrey Chernoff v Sinai Hospital of Detroit and the Detroit Medical Center,* ____ Mich App ____ Case No. 228014, decided March 22, 2002, leave to appeal held in abeyance by this Court by order dated April 23, 2002, 661 N.W. 2d 237 pending a decision in this case, (Appendix, pp. 83a-86a). Consistent with *Omelenchuk,* the Court of Appeals in *Chernoff* disagreed with Defendants' contention, and with the trial court's ruling. **The Court of Appeals held that the tolling provisions of MCL 600.5856(d) do apply to wrongful death actions under MCL 600.5852.** See footnote 1, *Chernoff.*

The decedent in *Chernoff* died on September 29, 1995. The two year statute of limitations for medical malpractice actions would therefore expire on September 29, 1997. However, the plaintiff was appointed personal representative of the decedent's estate on April 23, 1997, thereby extending the statute of limitations for two years from the date the personal representative was appointed, until April 23, 1999. Defendants argument here, applied to the facts in *Chernoff,* would be that the 182 day tolling provision does not apply to this extended two year period for the personal representative to file suit. Under this argument, Chernoff would only have until April 23, 1999 to file the suit, regardless of when the NOI was filed. The Court of Appeals in *Chernoff* disagreed, holding: "The filing would have been within the statutory period, which defendants contend expired on September 24, 1999 [six extra months from the date the NOI was filed], provided plaintiff had remained the personal representative." [The letters of authority expired on June 18, 1998, and plaintiff was not reappointed personal representative until ten months after suit was filed.] In footnote 1, the Court further explained, "**Ordinarily, the**

statute of limitations would have expired on April 23, 1999, or two years after plaintiff was first appointed personal representative. Because plaintiff filed a notice of intent on April 16, 1999, the limitation period was tolled under MCL 600.5856(d) until September 24, 1999. [Emphasis added].

The Court of Appeals has followed the reasoning of Chernoff in two other cases, specifically noting that the NOI waiting period extended the wrongful death/medical malpractice statute of limitations. *See* Fournier v Mercy Community Health Care System-Port Huron, supra; and Knobloch v Langholz, supra.

Applying these rules and Omelenchuk and Chernoff to this case, the wrongful death savings statute of limitations was set to expire on April 18, 1999. MCL 600.5852. The required notices of intent were served on January 16 and 19, 1999. Both of these events occurred long before the expiration of the extended medical malpractice-wrongful death limitations period — April 18, 1999. At the time they were served, there was 89 days (from January 19, 1999 to April 18, 1999) left on the statute for any claim against Defendant Wyse, and 92 days (from January 16, 1999 to April 18, 1999) left on the statute for any claim against Defendant Hills & Dales. Under Omelenchuk, in order to determine when the statute of limitations expired on plaintiff's respective claims against these Defendants, those days (i.e., 89 days and 92 days) must be added to the expiration of the applicable Sec. 2912b notice period. Since the NOI period regarding Wyse ended on July 20, 1999 (182 days added to January 19, 1999), the expiration of the limitations period as to any claim against her was extended to October 17, 1999 (this date is computed by adding 89 days to the end of the NOI period). As to Hills & Dales, because the NOI period ended on July 17, 1999 (182 days added to January 16, 1999), the expiration of the limitations

period as to any claim against it was also extended to October 17, 1999 (this date is computed by adding 92 days to the end of the NOI period). Because of the prohibition against suit during the 182 day notice period under Sec. 2912b, which was shortened in this case to 154 days because the Defendant did not furnish Plaintiff's attorneys with a written response under Sec. 2912b(7), Plaintiff was permitted by the language of Sec. 2912b(8) to file suit against Wyse no sooner than June 22, 1999, and against Hills & Dales no sooner than June 19, 1999. Therefore, Plaintiff's suit on June 23, 1999 was timely filed. It was filed almost four months before the statute of limitations expired. In concluding otherwise, the Courts below erred. They simply misread or misapplied the relevant statutes, or ignored Omelenchuk and Chernoff— or both.

The Court of Appeals fall back position in this case is found in footnote 2 of their opinion. They note:

> "To the extent that plaintiff relies on *Omelenchuk*, *supra* at 577, we find that case distinguishable. In that case, the Supreme Court added the 182-day tolling period to the two-year limitation period that started when the personal representative was appointed, not the five-year maximum at issue here. Plaintiff also cites *Chernoff v Sinai Hospital of Greater Detroit*, unpublished per curiam opinion of the Court of Appeals, entered March 22, 2002. (Docket No. 228014), in which this Court applied notice toling to the two-year period after appointment of a personal representative. However, we are not bound by an unpublished opinion, MCR 7.215(C)(1), and further, that decision also did not address the five-year maximum.

Thus, the Court of Appeals below concedes that this Court has ruled directly contrary to their holding. The Court attempted to distinguish *Omelenchuk* and *Chernoff* by saying that even if the 182 day tolling period applies to the two year period given to a personal representative to file suit under MCL 600.5852, the same tolling provision somehow does not apply to the five year total period allowed under the same statute. Such a distinction makes absolutely no sense—either the tolling provision applies to all of the provisions of MCL 600.5852, or it does not.

For these reasons, Plaintiff asks this Court to follow *Omelenchuk*, reverse the trial court, and Court of Appeals, and reinstate this case.

II. THE TRIAL COURT ERRED IN RULING THAT COLLENE WALTZ, THE PERSON WHO FILED THE NOTICE OF INTENT TO FILE SUIT, HAD TO BE APPOINTED PERSONAL REPRESENTATIVE IN ORDER TO FILE THE NOTICE BECAUSE: 1) THE NOTICE OF INTENT STATUTE HAS NO SUCH REQUIREMENT; AND 2) THE APPOINTMENT OF COLLENE WALTZ AS PERSONAL REPRESENTATIVE ON MAY 27, 1999, A MONTH PRIOR TO THE COMPLAINT BEING FILED, RELATES BACK TO SERVICE OF THE NOTICES OF INTENT IN JANUARY, 1999.

Standard of Review

Questions of statutory interpretations are decided de novo, as are legal questions involving the statute of limitations. Omelenchuk v City of Warren, supra at 571, n. 10. (Appendix, pp.83a)

A. Introduction

This is a wrongful death action for medical malpractice. Consequently, it must comply with the 1993 Tort Reform Act requirements applicable to such actions. One of those requirements is that the complaint be preceded by serving the intended defendant(s) a Notice of Intent to bring the claim. The statute, MCL 600.2912b, sets forth this requirement as follows:

> "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

Collene Waltz, the decedent's mother, engaged the services of attorney Heidi Salter-Ferris to handle this claim. Ms. Salter-Ferris, having written the Michigan Trial Lawyer's Association Book explaining the ramifications of the Tort Reform Act — The 1993 Michigan Medical Malpractice Act Tort Reform Act -- thought that there was no requirement under the notice

statute, MCL 600.2912b, that a personal representative be appointed before filing the NOI. Ms. Salter-Ferris served the NOIs in January, 1999 and signed the notices in her capacity as "Attorneys for Plaintiff/Claimant", as she does in every case.[7]

At the time the Notices of Intent were served, the Estate of Jerrith Waltz had not been opened. The statute requiring the Notices to be filed, MCL 600.2912b, does not require that a personal representative be appointed prior to the Notices being filed. Ms. Salter-Ferris, thinking that there was no requirement that a personal representative file the notice, filed the notice in her own signature, as she does in every case. In contrast, the law is clear that a complaint for wrongful death — not a notice of intent — may only be filed by a duly appointed personal representative. See Osner v Boughner, 152 Mich App 744 (1986); and Saltmarsh v Burnard, 151 Mich App 476 (1986). (Appendix, pp. 87a-95a).

Approximately four months after the Notice of Intent was served, Collene Waltz petitioned the Probate Court and was appointed personal representative of the Estate of Jerrith Waltz on May 27, 1999. Although she had not been Personal Representative of the estate at the time the notice was given, she had been appointed to that position during the 182 day notice waiting period, before the complaint was filed. As is required by law, the plaintiff in this lawsuit is Collene Waltz, as personal representative. It is not the estate of Jerrith Waltz.

Defendants moved for summary disposition claiming that the Notice of Intent was not valid and did not fulfill the pre-suit notice requirement because Collene Waltz was not Personal Representative when the notice was given. The trial court agreed, saying " . . . due to Plaintiff

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[7]Ms. Salter-Ferris practices almost exclusively plaintiff's medical malpractice law, including wrongful death cases.

lacking the Letters of Authority, she had no authority to file the Notice of Intent in January 1999." (Opinion, 11/7/00, p. 2, Appendix, p.72a).

Plaintiff appealed to the Court of Appeals, contending that the trial court erred by reading requirements into the Notice of Intent statute that are neither found in the statutory language, nor consistent with the legislative purpose. Plaintiff also argued that even if the NOI statute is interpreted to require that a personal representative be appointed before the notice can be filed, under Osner v Boughner, 152 Mich App 744(1986); and Saltmarsh v Burnard, 151 Mich App 475 (1986) (Appendix, pp. 87a-95a), the appointment of Collene Waltz as personal representative in May, 1999, prior to the complaint being filed, relates back to the service of the notices of intent in January, 1999. Because the Court of Appeals ruled that wrongful death limitations was not tolled for 182 days under MCL 600.5856(d), it did not reach this issue raised by Plaintiff on direct appeal.

B. Argument

1. The Notice of Intent Statute does not require that the "person" giving the notice be an appointed personal representative at the time the notice is given.

a. The particular language of the Notice of Intent statute does not require that the "person" giving the notice be an estate's appointed personal representative.

The words of the Notice of Intent statute do not require that the "person" giving the notice have any particular status. The language used by the Legislature merely specifies that a "person" who intends to file a medical malpractice action may not do so unless that "person" has first given the Notice of Intent.

In this case the "person" who gave the required written notice was Collene Waltz. As is

required in a wrongful death actions, she was later appointed personal representative **so that she could file the complaint**. Although she was then personal representative of the estate, Collene Waltz was also the "person" who commenced the action. Under the express language of the wrongful death act, a wrongful death action may only be brought "by, and in the name of the personal representative of the estate of the deceased person." MCL 600.2922(2). **As a consequence, the plaintiff in a wrongful death action is the personal representative — not the estate.** Wright v Treichel Estate, 36 Mich App 33, 35 n.1 (1971). **Moreover, the attorney retained by the personal representative represents the personal representative — and not the estate.** Wright, 36 Mich App at 36-37; McTaggart v Lindsay, 202 Mich App 616, 617 (1993).

Collene Waltz was the "person" who earlier gave the Notices of Intent. She was no less a "person" when she gave the Notices, regardless of the fact that she was not then personal representative of the estate.

In short, the statute requires nothing more than this — that a person who would commence a medical malpractice action must first give a Notice of Intent to do so. Collene Waltz was the "person" who commenced the action by filing the lawsuit. That is no less true for the fact that she did so in her capacity as personal representative of the estate. Collene Waltz was also the "person" who had earlier given the notice. Moreover, nothing in the statutory language says that she had to be the estate's personal representative as the "person" giving that notice. Simply put, Collene Waltz was the person who gave the Notices, and Collene Waltz was the person who filed suit. This is all the notice statute requires. The wrongful death statute also does not require that a personal representative be in place in order to file the pre-suit notice. It only

requires that a personal representative be in place to file the lawsuit.

The rules of statutory construction set forth above on pages 15 and 16 apply with equal force here. There are no ambiguities in the language of the Notice of Intent statute. The courts are constrained to apply the statutory language as it is plainly written and without imputing requirements or qualifications that are not found within the words used by the Legislature.

Applying those principles here, the Notice of Intent was, indeed, in compliance with the statute. Collene Waltz was the "person" who gave the Notice of Intent. Collene Waltz was the "person" who commenced the action by filing suit. The trial court erroneously construed the statute's language, adding requirements not found in the clear legislative expression. Simply put, nowhere is the statute is the requirement that the person who gives the notice must first be appointed personal representative in order to make the notice valid.[8]

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[8] Because this is an issue of first impression, it is important to point out the effect of Defendants' argument on other factual scenarios. Nowhere in the act is the term "person" defined into a sub-category of legal entities. In fact, the balance of the section of this portion of the Act references putative litigants as "claimants." Clearly a claimant is not tantamount to a personal representative, and nowhere in the body of the act is there a requirement that the person who sends the written notice must be the person that becomes the ultimate plaintiff in the lawsuit. Certainly, Defendants should not have the benefit of reading into an act that is so demanding of the claimant another requirement that is never specified. There are certainly circumstances where an heir or relative of an injured person could hire an attorney to file a Notice of Intent on behalf of the injured person or decedent, but choose not to be the personal representative. There are situations where a child might file a notice of intent, but a spouse might be named personal representative, or even a financial institution might be deemed or named executor or personal representative. In the latter case, does this mean that an heir at law under the wrongful death act cannot hire an attorney to send an NOI?

Clearly the statute does not require that the ultimate personal representative be the individual named as the claimant in the NOI. Nor is there any requirement that a personal representative be in place in order to file an NOI. Obviously , in a wrongful death action, there are claimants that are entitled to claim damages who are not personal representative. All heirs at law under the Wrongful Death Act may make a claim on an estate. Simply put, **they are claimants.** The language of the statute in question even refers to the person filing Notices of

Defendants' argument also does not make sense procedurally. There is nothing in the probate code which requires that an estate be opened prior to the notice of intent being filed. In contrast, an estate must be opened prior to a lawsuit being filed. Taking Defendants' argument to its logical conclusion, they would argue that anyone who does not have the legal capacity to sue cannot file a notice of intent to file claim. In other words, if a child has been injured by medical malpractice, Defendants would argue that a next friend would have to be appointed prior to filing suit. There is no such requirement. A next friend only has to be appointed in order to bring suit, not in order to serve a notice of intent to file claim.

Simply put, there is no legal or statutory requirement that a next friend, or a personal representative be appointed prior to filing a notice. Practically speaking, many plaintiffs' malpractice cases are being reviewed by experts and being investigated during the notice period. Plaintiffs are not going to go through the expense of opening an estate until they know definitively that they are going to file suit. This often does not occur until after the notice of intent has been filed. In fact, there is no practical reason for the personal representative to be in place before the NOI is drafted and served. Attorneys for claimants draft and sign the NOIs, not the claimant. Moreover, the complaint cannot be filed during the six month waiting period. There is no reason to have a personal representative appointed during this six month waiting period.

This is no different than any other wrongful death personal injury suit. For example, a

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Intent as claimants. Thus, the statute acknowledges that a number of individuals could qualify as the sender of a Notice of Intent. Defendants are attempting to create a new requirement that is not based on any statutory premise, legislative history, or legal analysis. An heir at law, or interested party can certainly hire an attorney to make a claim via an NOI without an estate ever being opened.

man is killed in an automobile accident. Liability is admitted by another driver. The wife of the man who was killed does not have to open his estate prior to negotiating a settlement with the at fault driver's insurance company. Only after a settlement is reached must an estate be opened, so that the probate court can approve the settlement.

Similarly, in a medical malpractice case, an estate does not have to be opened prior to filing a notice and attempting to settle the case during the notice period. However, if the claim is rejected, then a personal representative must be appointed in order to bring suit.

b. The trial court's interpretation is contrary to the legislative purpose for the Notice of Intent statute.

The Court of Appeals succinctly stated the purpose of the Notice of Intent statute in Neal v Oakwood Hospital Corp, 226 Mich App 701 (1997). The Court said that the statute is intended to "encourage settlement without the need for formal litigation." Id, at 715. The Court expanded upon this later in the opinion:

> ". . . As indicated previously, Sec. 2912b(1) was enacted for the purpose of promoting settlement without the need for formal litigation and reducing the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. . . . The means sought by the Legislature, i.e., a relatively short notice period before the commencement of suit during which time informal discovery can occur, is rationally related to the Legislature's objective, because it is reasonable to assume that claims informally resolved or settled without resort to formal litigation will help reduce the cost of formal medical malpractice litigation. . . ." Id. at 719-720.

This purpose is not served in any way by requiring that plaintiffs undertake formal probate proceedings prior to giving the notice. The Legislature intends that the notice commence and facilitate **informal** discovery and settlement discussion, without the need for the commencement of suit. Should that process prove fruitless, with a lawsuit being the next step, then the formal

litigation process would start with probate proceedings for appointment of the personal representative so that suit can be filed. However, earlier informal investigation and settlement discussions would not be dependent at all on probate proceedings being initiated.

The statutory Notice of Intent scheme is designed to commence an informal, pre-suit settlement process. Requiring the person who gives that notice to first commence probate proceedings and obtain appointment as the estate's representative would not serve that purpose at all. In fact, that would be contrary to the legislatively intended mechanism for commencing an informal process.

In short, the language of the statute does not require that the "person" giving the notice be first appointed the estate's representative in a formal probate proceeding. Furthermore, the Legislature's purpose for this scheme does not call for such a requirement, and there is no reason at all, then, for the courts to read one into the statute.

2. Under Michigan case law, the appointment of Collene Waltz as Personal Representative on May 27, 1999, a month prior to the complaint being filed, relates back to service of the notices of intent in January, 1999.

Plaintiff argued in the trial court that even if the NOI statute is interpreted to require that a personal representative be appointed before the notice can be filed, under Osner v Boughner, 152 Mich App 744 (1986); and Saltmarsh v Burnard, 151 Mich App 475 (1986) (Appendix, pp. 87a-95a), the appointment of Collene Waltz as personal representative in May, 1999, prior to the complaint being filed, relates back to the service of the notices of intent in January, 1999. Plaintiff buttressed this argument in the Court of Appeals with the recent case of *Chernoff v Sinai Hospital of Detroit, supra,* which followed *Osner* and *Saltmarsh* in finding the relation-back

theory applicable to the facts here — where a notice of intent was filed when no personal representative was in place.

Defendants conceded below that Colleen Waltz was appointed personal representative in May, 1999, during the 182 day tolling period, two months before the Complaint was filed, and four months before the statute of limitations expired. Defendants argued that this four month delay between the Notice being served and the Complaint being filed "is not a reasonable length of time for ratification and relating back." (Page 5, Defendant Wyse's Supplemental Brief.)

The trial court failed to address this issue as did the Court of Appeals.

Plaintiff's argument is again supported by numerous Court of Appeals' decisions. See Osner v Boughner, supra; Saltmarsh v Burnard, supra (Appendix, pp. 87a-95a); and Chernoff, supra (Appendix, pp. 83a-86a). In Osner, the wife of a man killed in an auto accident timely brought a wrongful death suit in 1981, even though she was not appointed personal representative. No estate had been opened. Three years later, which was one year after the wrongful death statute of limitations had expired, she was appointed personal representative. The probate judge refused to give retroactive effect to her appointment. The trial court found that her action was barred because she did not have legal capacity to bring the suit in 1981, and by the time that she did have the capacity, the statute of limitations had expired for over one year.

The Court reversed, finding that her appointment as personal representative "related back" three years to when she timely filed the suit. The Court noted, "The policy behind the doctrine of relation back is to avoid allowing legal technicalities to defeat valid claims." In Osner, the wife had been told by her attorney in 1981 that she was automatically the personal representative and could bring suit. When she filed the lawsuit, she misrepresented that she was the personal

representative. Because this misrepresentation was made in good faith, her appointment was held to relate back three years to when she filed suit. The Court adopted the holding of the Sixth Circuit in Wieczorek v Volkswagenwerks, AG, 731 F.2d 309 (CA 6, 1984):

"We therefore conclude that, under Michigan law, an appointment as administrator after the statute of limitations has expired relates back to the filing of a wrongful death suit if at the time the suit was filed the plaintiff reasonably believed he had authority to bring suit as administrator."

In Saltmarsh, a wrongful death action was timely brought by a wife for the death of her husband after an estate was opened. The case was settled, and the estate was closed. Prior to the estate being reopened, the wife brought a legal malpractice claim against the attorneys who had represented the estate. The statute of limitations then ran without the estate being reopened. The estate was then reopened, and the wife asked that her re-appointment as personal representative relate back to when she filed the legal malpractice complaint. The trial court dismissed the case, finding that she lacked legal capacity to sue, and that the doctrine of relation back did not apply, because her second attorney's knowledge that the estate was closed when she filed the legal malpractice claim could be imputed to the client.

The Court reversed, finding that the client had the good faith belief that she could file suit, and that her attorney's knowledge that the estate had been closed and had not been reopened could not be imputed to the client.

In *Chernoff*, the decedent died on September 29, 1995, while she was a patient at Sinai Hospital. The plaintiff was appointed personal representative of the decedent's estate on April 23, 1997. However, the letter of authority expired on June 18, 1998, and the plaintiff was discharged as personal representative on September 22, 1998. On April 16, 1999, the plaintiff filed a notice of intent to sue, and then filed a complaint on September 17, 1999. The filing would

have been within the statutory of limitations, which expired on September 24, 1999 (two years, and 182 days after appointment of the personal representative), provided the plaintiff had remained personal representative. The defendants brought a motion for summary disposition. They argued that the personal representative did not have authority to file the notice of intent or the complaint because her letters of authority had expired well before she filed the NOI and the complaint, and that she was not reappointed personal representative until 10 months after filing suit. The trial court in *Chernoff* had denied the motion for summary disposition, holding that under the relation-back doctrine, the personal representative's appointment 10 months later related back to the day the complaint was filed. Therefore, the plaintiff did have the authority to file the complaint on the day it was filed, thereby avoiding the bar of the statute of limitations.

The Court of Appeals agreed with the trial court, holding that the personal representative assumed she had authority to file the suit, and that under the relation-back doctrine, the personal representative's authority given ten months after filing suit related back to the date she filed suit. In so holding the Court relied on *Saltmarsh* and *Osner*. **Interestingly and extremely important to this case is the fact that neither the trial court nor the Court of Appeals held that the law required that the personal representative had to be in place in order to file the notice of intent. Neither the trial court nor the Court of Appeals held under the relation-back doctrine that the personal representative in Chernoff had authority to file the notice of intent, nor did either Court hold that a personal representative had to be appointed in order to first file the notice of intent. The Courts specifically held that the personal representative's authority related back only to the date of the filing of the complaint, not to the date of filing the NOI.**

In sum, two of the lessons of *Chernoff* are that a personal representative does not have to be in place to file an NOI, and the filing of the NOI tolls the wrongful death "extension" of the statute of limitations, even if a personal representative is not in place. The trial court rulings and the Court of Appeals decision in this case are directly contrary to *Chernoff*. In this case, the timely filing of the NOI during the grace period tolled the extended statute of limitation for 182 days, and the personal representative was appointed prior to the suit being filed. This Court should follow *Chernoff*, reverse the Court of Appeals, and reinstate this case.

The final lesson of *Chernoff* is that the Court of Appeals recognized that it has regularly applied the relation-back doctrine where the client has a good faith belief that she had authority to file the lawsuit. For the reasons stated above, under *Chernoff* the NOI was timely filed as was the complaint. The Defendants here are arguing about authority, not timeliness. The Defendants are arguing that Ms. Waltz did not have authority to file the NOI, and therefore, the statute of limitations was not extended. As was stated, under *Chernoff*, a personal representative does not have to be in place in order to file the NOI, and extend the statute. If this Court disagrees with *Chernoff* and follows Defendants' "lack of authority argument", then under the relation-back doctrine plaintiff thought she had authority to file the NOI, and her appointment as personal representative should relate back to the filing of the NOI.

Finally, as in *Chernoff*, the Defendants here were not prejudiced. They received the notice of intent three months prior to the wrongful death statute of limitations expiring, and did not object during that 182 days as to the authority of Ms. Waltz to send the NOI. They instead "sandbagged" Plaintiff, waiting until well after the case was filed and discovery was started to object to the authority of Ms. Waltz.

In summary, Plaintiff and her attorneys did not and do not believe that she had to be appointed personal representative in order for a Notice of Intent to File Claim to have been served. No case law requires such, nor does the Notice statute, nor does the wrongful death statute. The latter only requires that the personal representative be appointed prior to filing suit. Colleen Waltz was appointed personal representative prior to filing suit, and in contrast to the women in Saltmarsh and Osner and Chernoff, the statute of limitations had not run prior to her filing suit.

However, if a personal representative must be in place prior to the filing of the Notice of Intent to File Claim--under the holdings of Osner and Saltmarsh, and Chernoff, Collene Waltz's appointment surely relates back four months from May 1999 to January 1999. In Osner, the Court of Appeals held that the appointment **related back three years, twelve times longer than the period in question here.** Moreover, unlike in Osner, Colleen Waltz made no misrepresentation that she had been appointed personal representative when the notice was filed. No representation was made because none was required — i.e., the law did not require that a personal representative be in place when the Notices were served.

Finally, under both Osner and Saltmarsh, Colleen Waltz had no idea that there was any requirement that she be appointed personal representative prior to the filing of the Notice of Intent. She had a good faith belief, as did her attorneys, that the notice could be filed prior to her being appointed personal representative, as long as she was appointed prior to filing suit, and prior to the statute of limitations expiring. This was done. Simply put, both Plaintiff and her attorneys had a good faith belief that the Notices could be served prior to a personal representative being appointed. See Wieczorek v Vokswagenwerks, AG, supra.

Defendants are arguing a "legal technicality" in an attempt to defeat a valid claim. The very reason for the application of the relation-back doctrine is the desire of the courts not to have valid claims voided by "legal technicalities." Castle v Lockwood-MacDonald Hospital, 40 Mich App 597, 603-604 (1972). The doctrine of relation back defeats Defendants' legal technicality. Plaintiff's attorneys knew that the notice had to be filed prior to April 18, 2000. They did so. Plaintiff's attorneys knew that this notice tolled the statute for 182 days, and that suit could not be filed until the notice was rejected. They waited to file suit. They did not try to file suit before the waiting period required by NOI statute had expired. Plaintiff's attorneys knew that a personal representative had to be appointed prior to suit being filed. This was done. However, nowhere does the law say that a personal representative must be in place prior to the Notice being served. Plaintiff's attorneys, and more importantly -- Plaintiff -- had a good faith belief that the Notices could be filed without her being appointed personal representative. If the law clearly provided otherwise, Plaintiff's attorneys would have made sure that she was appointed in January, prior to the notices being served.

Therefore, even if this Court rules that Collene Waltz should have been appointed prior to the notices being served, under Osner and Saltmarsh and Chernoff, her appointment prior to the statute of limitation running, and prior to the lawsuit being filed, relates back to the serving of the notices.

For these reasons, this Court should reverse the trial court and the Court of Appeals, and reject Defendants arguments that the Statute of Limitations had expired.

III. DEFENDANT WYSE'S MOTION UNDER MCR 2.116(C)(8) MUST BE DENIED BECAUSE THE NOTICES OF INTENT, COMPLAINT, AND AFFIDAVITS OF MERIT ADEQUATELY STATE A CLAIM FOR MEDICAL MALPRACTICE. MOREOVER, THE CASE SHOULD NOT HAVE BEEN DISMISSED BECAUSE UNDER MCR 2.116(I)(5), THE TRIAL COURT SHOULD HAVE GIVEN PLAINTIFF THE OPPORTUNITY TO CURE ANY DEFECT PURSUANT TO MCR 2.118(A)(2).

Standard of Review

Defendant Wyse brought this motion under MCR 2.116(C)(8). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone. This Court reviews this matter de novo. This Court must determine whether Defendant is entitled to a judgment as a matter of law. Porter v Henry Ford Hospital, 181 Mich App 706 (1990); Theisen v Knake, 236 Mich App 777 (1999). This Court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties, and construe the pleadings in favor of the Plaintiff. All factual allegations supporting the claim, and any reasonable inferences that can be drawn from the facts, are accepted as true. A motion under this subrule should be granted only if no factual development could provide a basis for recovery. Id. Moreover, even if the trial court grants a (C)(8) motion, the court should not dismiss the case with prejudice. Under MCR 2.116(I)(5), the trial court must give the parties an opportunity to cure any defect pursuant to MCR 2.118(A)(2) unless the amendment would be futile. Doyle v Hutzel Hospital, 241 Mich App 206 (2000). MCR 2.118(A)(2) provides leave to amend a pleading "shall be freely given when justice so requires."

Defendant Waltz's Motion Below

Shortly after Defendant Waltz filed her answer, she made a motion for summary disposition under MCR 2.118(C)(8) arguing that Plaintiff's Notice of Intent, Complaint, and Affidavit of Merit failed to state a claim upon which relief could be granted. She argued that Plaintiff had not set out clearly what the standard of care was, how it was breached, and how the breach caused Jerrith Waltz's death. **Defendant Hills & Dales did not join in this (C)(8) motion.**

Plaintiff attached to her answer in the trial court the notices of intent, the complaint, and the two affidavits of merit. (Appendix, pp. 9a-36a). The facts of this case and the allegations which Plaintiff made below are detailed in the Notices of Intent, the Complaint, and two Affidavits of Merit. Defendant Dr. Carol Wyse was Jerrith Waltz's physician. In February of 1994, Jerrith was seen by Dr. Wyse for projectile vomiting. Dr. Wyse continued to treat Jerrith until his death on April 18, 1994. Between February and April, Dr. Wyse saw Jerrith for complaints of vomiting, diarrhea, pneumonia, inability to eat, and dehydration. During this time period, Jerrith also presented to the emergency room of Defendant Hills & Dales Community General Hospital on March 30, April 13, and April 17, 1994. During these visits in April, Jerrith was suffering from pneumonia, diarrhea and dehydration, none of which were addressed, nor was the child admitted to the hospital. On April 14, Dr. Wyse's office was contacted regarding Jerrith's condition. On April 14 and 15, Jerrith's mother called Dr. Wyse's office, but Dr. Wyse refused to see Jerrith, telling his mother that she should take him to the University of Michigan Hospital in Ann Arbor. Jerrith's mother called U of M Hospital and made an appointment, but the first available appointment was two weeks away.

Jerrith presented to the Emergency Room at Defendant-Appellee Hills & Dales Hospital on April 17, 1994 with the same symptoms. Jerrith was not hydrated by Hills & Dales. He died on April 18, 1994 without ever being hydrated.

Defendants disingenuously indicated in their briefs at the trial court level that the cause of death is unknown. The local pathologist asked Dr. Werner Spitz, long-time Chief Medical Examiner for Wayne County to consult, and determine the child's cause of death. Dr. Spitz's conclusion is that Jerrith Waltz died of dehydration. This is consistent with the amended certificate of death which was filed a month after Jerrith's death. The cause of death was listed as cardiac dysrhythmia due to acid/base imbalance and dietary intolerance. In other words, an electrolyte imbalance due to dehydration caused his heart to go dysrhythmic, causing his death.

The Notices of Intent to File Claims under MCL 600.2912b detail these facts, and indicate that both Defendants violated the standard of care by failing to address his dehydration and pneumonia, instead abandoning the infant, which resulted in his death. (Appendix, pp. 9a-21a) The Affidavits of Merit by Dr. Kenneth Nelson, Board Certified Family Physician, and by Dr. James Matthews, Board Certified in Emergency Medicine, clearly set out how the Defendants violated the standard of care — they failed to properly evaluate the child, failed to IV hydrate him and give him IV antibiotics, failed to see that he received critical care treatment, and failed to admit him to the hospital. This baby was not properly treated from April 13 to April 18, 1994. As a result, he died of dehydration. (Appendix, pp 33a-36a).

The only discovery that had been taken prior to argument and ruling on the Motion was the deposition of Collene Waltz, mother of Jerrith Waltz. None of the Plaintiff's or Defendants' standard of care and causation experts had been deposed, including Plaintiff's experts Dr.

Kenneth Nelson, board certified Family Physician, Dr. James Mathews, Board Certified Emergency Medicine Physician, and Dr. Werner Spitz, Board Certified Pathologist.

At argument on the Motion in the trial court, Defendant Waltz's counsel focused on her statute of limitations claims. As to Defendant Wyse's (C)(8) failure to state a claim argument, **Defendant Wyse's counsel suggested that the remedy the trial court should fashion was to order Plaintiff to file an amended complaint, or make a more specific statement of the allegations of negligence and proximate cause.** (Appendix, pp. 43a).

On November 7, 2000, the trial court issued a 3 page written opinion. (Appendix, pp. 68a-70a) Despite Defendant Wyse's suggestion during oral argument that the trial court should require Plaintiff to file a more specific amended complaint, the trial court instead ruled that the case should be dismissed, stating that Plaintiff failed to state a claim upon which relief could be granted against Defendant Wyse because "Plaintiff failed to specifically plead what acts or omissions Defendant Wyse did or did not do as recognized by the medical profession", citing Porter v Henry Ford Hospital, supra.

Argument

It must be remembered that Defendant Wyse's motion was brought early on in the litigation, when very little discovery had been done. The (C)(8) motion challenged the legal sufficiency of the pleadings. Defendant Wyse challenged the sufficiency of the Notices of Intent, Complaint, and Affidavits of Merit.

In deciding a (C)(8) motion, the trial court was required to consider all affidavits, pleadings, and other documentary evidence submitted by the parties, and construe the pleadings in favor of the Plaintiff. All factual allegations supporting the claim, and any reasonable inferences

that can be drawn from the facts, had to be accepted as true. The trial court could only grant the motion if no factual development could provide a basis for recovery. Porter v Henry Ford Hospital, supra. The trial court cited Porter in finding that "Plaintiff failed to specifically plead what acts or omissions Defendant Wyse did or did not do as recognized by the medical profession." In so doing, the trial court forgot that the holding of this Court in Porter was that what Plaintiff had to do in her complaint was to made sure that "the allegations were concrete enough to enable defendant to prepare a defense." Id. at 40. The Court of Appeals noted that "One purpose of discovery is to enable plaintiff to substantiate and specify his case. Defendant had the ability to learn which facts were uncovered after filing. If there was any doubt, a motion for a more definite statement or interrogatories would insure that the defendant was fully informed." Id. at 40.

Plaintiff contends that her notices of intent, complaint, and affidavits of merit clearly set out the elements of a medical malpractice claim against Defendant Wyse, including the standard of care and how Defendant Wyse abandoned it. They were surely concrete enough to enable Defendant Wyse to prepare a defense. Plaintiff has three experts who will testify as to the standard of care, and causation. Dr. Kenneth Nelson, board certified Family Physician, who has not been deposed, will develop the facts necessary to prove the allegations against Dr. Wyse. It is clear from the notices, the complaint, and the affidavits of merit that Plaintiff's claim is that Dr. Wyse violated the standard of care by failing to provide treatment, or make certain that Jerrith Waltz was properly treated for his pneumonia, vomiting, and diarrhea, instead abandoning him. Dr. Wyse refused to treat Jerrith Waltz on April 14 and 15, 1994, and failed to make certain that Defendant Hills & Dales Hospital provided critical care treatment to the baby, including IV

antibiotics and hydration. As a direct result of her failure to make certain that he received adequate antibiotics and hydration, Jerrith Waltz died of dehydration on April 18, 1994.

Plaintiff's contention that her Notices of Intent and Affidavits of Merit were sufficient is supported by the recent decision of the Court of Appeals in Roberts v Mecosta County General Hospital, 252 Mich App 664 (2002). In that the case, the Court noted that the NOI must be read as a whole, not paragraph by paragraph, and that there is no requirement that the plaintiff be accurate in what the standard of care is, or how it was breached. The notice does not even have to represent a picture of clarity. It must set out allegations which put the defendants on notice of the general nature of plaintiff's claim of malpractice. In this case, the entire language of the notices of intent and the affidavits of merit more than adequately clearly set forth the theories of Plaintiff and the opinions of Plaintiff's experts. Both the notices and affidavits were certainly as adequate as the ones found to be adequate by the Court of Appeals in Roberts.

Finally, as Defendant Waltz's counsel suggested at oral argument on the motion to the trial court, even if Defendant Waltz was not put on adequate notice of Plaintiff's allegations, the remedy the trial court should fashion was to order Plaintiff to file an amended complaint, or make a more specific statement of the allegations of negligence and proximate cause. This is consistent with the Court Rules, and with the Court of Appeals' recent decision in Doyle v Hutzel Hospital, supra. Under MCR 2.116(I)(5), the trial court must give the parties an opportunity to cure any defect pursuant to MCR 2.118(A)(2) unless the amendment would be futile. Id.. MCR 2.118(A)(2) provides leave to amend a pleading "shall be freely given when justice so requires." An amendment here, if ordered, would not be futile.

RELIEF SOUGHT

For all of the above reasons, Plaintiff-Appellant Collene Waltz, personal representative of the Estate of Jerrith Waltz, asks this Court to reverse the Court of Appeals decision affirming the order of the trial court dismissing this case, and remand this matter for discovery and trial.

Respectfully submitted,

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